BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEREK HELMS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,040,578
DETROIT DIESEL REMANUFACTURING	)	
Respondent	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the March 4, 2009, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

Claimant alleged he injured his right knee working for respondent in a series of accidents that occurred from January 5 to May 4, 2008, and continuing. In the March 4, 2009, Order for Compensation, Judge Avery ordered the payment of temporary total disability benefits from May 6, 2008, to September 1, 2008. The Judge found: (1) claimant's accident date was May 5, 2008, (2) the accident arose out of and in the course of claimant's employment with respondent, (3) claimant provided respondent with timely notice of the accident, and (4) there was timely written claim.

Respondent maintains claimant failed to prove timely notice of his alleged accident or that he filed an Application for Hearing for an injury from a single, traumatic event. Next, respondent argues claimant's alleged injury did not arise out of his employment with respondent. Further, respondent denies claimant made timely written claim. Finally, respondent contends claimant was, and is, able to work and, therefore, he is not entitled to receive temporary total disability benefits. Respondent summarizes its arguments as follows:

> Claimant has not filed a Claim for Compensation or Application for Hearing indicating a singular traumatic event on May 5, 2008. Instead, his Application for

> Hearing claims injury due to a series from 1/5/08 through 5/4/08. Claimant's evidence at best results in a claim for injury resulting from a specific event on a specific date. Notwithstanding, Claimant's current injuries are the result of a chronic bad right knee and not any work related incident. The medical evidence and the fact Claimant sought and applied for short term disability support this finding. Claimant was terminated for cause and not due to his injury so therefore was not restricted out of his job with Respondent. Furthermore, Claimant is not eligible for TTD as he is ready, willing, and able to participate in gainful employment as exhibited by his employment on *[sic]* September and October 2008 and Claimant's weekly certifications to the Department of Labor in his unemployment application.[1]

In short, respondent requests the Board to reverse the March 4, 2009, Order for Compensation.

Claimant argues the Board lacks jurisdiction at this juncture to review the issue of whether the Judge erred by ordering preliminary hearing benefits for an accident for which no Application for Hearing has been filed. In the alternative, claimant argues the Judge did not err by finding, and awarding benefits for, a May 5, 2008, accident as the Judge has the authority to conform the Application for Hearing to the evidence presented. Claimant next asserts he provided respondent with notice of the May 5, 2008, accident the very next day as shown by an attendance exception form he completed for his supervisor. Next, claimant contends his attorney's June 2008 letter to respondent and the Application for Hearing, which was filed with the Division of Workers Compensation in June 2008, establishes timely written claim. Finally, claimant asserts the Board lacks jurisdiction at this stage of the claim to reweigh the evidence and determine whether he satisfies the definition of being temporarily and totally disabled. In short, claimant requests the Board to affirm the March 4, 2009, Order.

The issues raised on this appeal are:

1. Did claimant sustain an accident that arose out of his employment with respondent?

2. If so, did the Judge err by granting benefits for a May 5, 2008, accident when the Application for Hearing alleged a series of accidental injuries from January 5 to May 4, 2008, and continuing?

3. Did claimant provide respondent with timely notice of his alleged accident?

4. Did claimant make timely written claim?

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[1] Respondent's Brief at 12, 13 (filed Mar. 30, 2009).

5. Does the Board have jurisdiction in an appeal of a preliminary hearing order to address the issue of whether claimant satisfies the definition of being temporarily and totally disabled? If so, is claimant entitled to receive temporary total disability benefits for the period determined by the Judge?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member finds:

Claimant began working for respondent in approximately October 2006. In late December 2007, claimant experienced intense right knee pain at work when his right knee popped when he arose from the floor after painting an engine. Claimant testified he reported the incident to his supervisor, Carl Hendricks, who had claimant prepare an accident report. What is more, Mr. Hendricks allegedly told claimant to contact a doctor and to use claimant's personal insurance.

Dr. Michael Yost, an orthopedic surgeon, began treating claimant and performed arthroscopic surgery on claimant's right knee to repair the lateral meniscus. Following that surgery, which was on January 22, 2008, claimant was off work for approximately three weeks. Claimant returned to work on light duty, which required a lot of walking. The knee allegedly worsened while claimant was on light duty.[2] Claimant testified he told his supervisor after returning to work following his surgery that his knee was getting worse as the pain was affecting his ability to work. Claimant admits telling Dr. Yost at a March 3, 2008, appointment that he had been doing okay at work but that he believed his knee was worsening due to physical therapy.

Claimant maintains that around May 4, 2008, he reinjured his right knee when he slipped in diesel fuel and oil and smacked his knee on the cement floor. He described that accident, as follows:

> I was -- I'd tore apart an engine that had all these -- all the parts on a cart. I went to grab a[ ]hold of the cart to move it, and I slipped because there was diesel fuel and oil on the floor, I slipped and went to fall and I protected my head and I resmacked my -- or I reinjured my knee because I smacked it on the cement floor.[3]

According to claimant, he told his supervisor about that incident and that he was returning to Dr. Yost for treatment. Indeed, claimant did return to the doctor, who took claimant off work and prescribed physical therapy.

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[2] P.H. Trans. at 11.

[3] *Id.*

In addition to telling his supervisor about his slip and fall, claimant also maintains that he discussed the incident with Becky Collins, who is respondent's human resources coordinator. Claimant testified *they* told him he had to fill out paperwork for short-term disability benefits and medical leave in order to preserve his job.[4] Moreover, claimant asserts that he prepared an accident report for the December 2007 incident and that for the early May 2008 incident he prepared and gave his lead man, Bill Rice, an attendance exception form.[5] Indeed, the record contains an attendance exception form claimant prepared and dated May 5, 2008, at 12:00 a.m. indicating he was pulling an MBE cart when his knee popped again and he could barely move his leg.

Dr. Yost's May 6, 2008, progress notes indicate claimant was pulling a cart at work on May 4, 2008, and felt a pop in his knee. Those progress notes also indicate the doctor diagnosed joint pain, joint effusion, and patellar tendonitis.

A November 11, 2008, medical report from Dr. Lynn A. Curtis (claimant's medical expert) indicates claimant has had chronic knee pain in the past. The doctor wrote that claimant's December 2007 incident at work occurred when he was crawling and climbing on an engine. In addition, the doctor noted that in April 2008 claimant slipped and fell in oil in a tight space. Finally, the doctor opined that claimant had not received medical treatment for the April 2008 injury and that claimant needed to see a second level knee surgeon.

At the preliminary hearing claimant explained he was unsure of the date of the slip and fall incident at work when he was examined by Dr. Curtis. In any event, claimant maintains that his knee was fairly stable after his January 2008 arthroscopic surgery but the alleged slip and fall incident definitely aggravated his knee and caused his pain to become constant. Claimant testified, in part:

> I mean, I had pain in my knee, but it was, you know, tolerable. You know, it wasn't too bad. I could get along and I had to wear -- I was having to wear a knee brace, and it wasn't too bad. And then after I reinjured my knee, it got so bad, it didn't matter if I had my knee brace on or taking pain medicine, it still . . . .[6]

Perhaps adding additional confusion to the exact date upon which claimant slipped and fell, claimant testified that at the time of his May 2008 accident his shift would begin on one day and end the next.

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[4] *Id.* at 20.

[5] *Id.* at 21, 42.

[6] *Id.* at 55.

The undersigned finds claimant's testimony is credible and that he injured his knee at work on May 4 or 5, 2008, when he slipped and struck his right knee on the floor. Furthermore, the undersigned finds claimant's accident arose out of and in the course of his employment with respondent.

Claimant did not return to work for respondent following the May 2008 accident as he was terminated for two no calls-no shows, which allegedly resulted over confusion about the date of a medical appointment. Claimant then lost his personal health insurance, which had been paying for Dr. Yost's treatment.

During September and October 2008, claimant helped run an oil field supply store until he was laid off. According to claimant he earned $8 per hour and worked full-time. When he testified in late February 2009, claimant was receiving unemployment benefits.

Respondent presented the testimony of Becky Collins, respondent's human resources coordinator. She testified claimant received short-term disability benefits following his January 2008 right knee surgery and that short-term disability leave was approved from May 6 until May 27, 2008.[7] She believed the applications for those benefits asked whether claimant's disability was caused by work. Ms. Collins also testified that claimant told her his right knee surgery was for an old football injury. Claimant, however, testified he never played football. Ms. Collins denied knowing that claimant had sustained an injury at work until she received a letter from claimant's attorney. On June 16, 2008, upon receiving that letter, Ms. Collins filed a report of injury.

Steven Sayler, respondent's human resources manager, also testified. Mr. Sayler confirmed that he terminated claimant on May 30, 2008, for failure to call in or come to work on May 27, 28, and 29, 2008.

Finally, Mr. Hendricks testified and denied that claimant reported a work injury to him before claimant underwent knee surgery in January 2008. Mr. Hendricks also denied that he ever told claimant to use his own health insurance for the medical treatment for his knee. In addition, Mr. Hendricks denied that claimant reported an accident at work in April 2008 from slipping in oil and falling. He also denied that claimant's job with respondent required crawling, kneeling, working in crowded places, or climbing on the engines being painted. Mr. Hendricks did, however, acknowledge that other employees sometimes lie down on the floor when painting the bottom of engines.

On June 11, 2008, the Division of Workers Compensation received claimant's Application for Hearing, form K-WC E-1 (Rev. 8-04). The form shows May 4, 2008, was

[7] Collins Depo. at 5, 6.

the date of accident initially entered on the form but it was crossed out. Below the retracted date someone wrote "series from 1-5-08 to 5-4-08 & continuing." Upon receiving the form E-1, the Division of Workers Compensation sent out a notice to respondent and its insurance carrier that the application had been filed. The Division in its notice indicated the date of accident was "Series 1/5/2008."

Claimant also filed an Application for Preliminary Hearing, form K-WC E-3 (Rev. 5-07), which was received by the Division of Workers Compensation on November 5, 2008. That application indicated claimant's date of accident was May 4, 2008. What is more, the application did not contain the docket number for the claim. The Division then notified claimant's attorney that there was a problem with the date of accident. Consequently, on November 6, 2008, the office of claimant's attorney sent a facsimile of the form E-3 to the Division. The facsimile of the form E-3 modified the initial form as the date of accident was deleted and the docket number was added. Apparently the second application was determined to be in proper form as the Division then sent to the parties another notice, which again noted the date of accident was "Series 1/5/2008."

CONCLUSIONS OF LAW

The Judge did not err in awarding claimant benefits for a May 5, 2008, accident at work.

The evidence establishes that claimant notified respondent of an accident that occurred at work on either May 4 or 5, 2008. The record is uncontradicted that claimant prepared and signed an attendance exception form, which he gave his lead man, that indicated claimant had reinjured his right knee at work. The claimant signed that form on the shift that began on May 4, 2008, and ended May 5, 2008. It is clear claimant's accident occurred on either May 4 or 5, 2008. Accordingly, claimant provided respondent with timely notice of that accident as notice was given within 10 days of the incident.[8]

Claimant likewise made timely written claim for workers compensation benefits as required by K.S.A. 44-520a. There is no question that claimant notified respondent of his claim for benefits when claimant's counsel wrote respondent and filed his Application for Hearing, which both occurred in June 2008. Those dates are well within 200 days of the alleged May 2008 accident. In short, claimant made timely written claim for benefits.

Claimant alleged a series of accidents and traumas that occurred from January 5 to May 4, 2008, and continuing. At this preliminary stage of the proceeding, it is yet to be seen whether the record will establish that claimant's knee injuries occurred from repetitive

[8] K.S.A. 44-520.

trauma at work, from a single traumatic event, or a combination of the two. What is more, the Workers Compensation Act provides that technical rules of procedure shall not apply. Instead, the parties are to be given both expeditious hearings and a reasonable opportunity to be heard and to present evidence. In addition, a judge may conform the pleadings to the evidence presented. Respondent has neither been prejudiced nor denied due process.

As indicated above, Judge Avery ordered the payment of temporary total disability benefits for the period from May 6, 2008, to September 1, 2008. The Board does not have the authority under the Act at this juncture to reweigh the evidence to determine whether claimant satisfied the definition of being temporarily and totally disabled during the period in question.[9] In short, that issue is not one of the jurisdictional issues set forth in K.S.A. 44-534a, nor did the Judge exceed his authority and jurisdiction in ordering temporary total disability benefits at a preliminary hearing.

In conclusion, the Order for Compensation should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the March 4, 2009, Order for Compensation entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of May, 2009.

KENTON D. WIRTH
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[9] See K.S.A. 44-534a and K.S.A. 2008 Supp. 44-551.

[10] K.S.A. 44-534a.